SUPREME COURT OF THE UNITED STATES.

No. 103.

GEORGE M. WHEELER, PLAINTIFF IN ERROR,

vs.

JOHN SEDGWICK, ASSIGNEE OF F. S. COMSTOCK AND JAMES M. WHEELER, BANKRUPTS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between George M. Wheeler, plaintiff in error, and John Sedgwick, assignee in bankruptcy of Frederick S. Comstock & James M. Wheeler, formerly composing the firm of F. S. Comstock and Company, defendant in error, a manifest error hath happened, to the great damage of the said George M. Wheeler, as is said, and as appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this twenty-third day of January, in the year of Lord one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-eighth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed.
January 23d, 1874.

SAM'L BLATCHFORD, *D. J.*

2 (Indorsed:) U. S. Supreme Court. George M. Wheeler, plff. in error, agt. John Sedgwick, assignee, &c., deft. in error. Writ of error. Goodrich & Wheeler, attys. for plff. in error, 59 Wall st., N. Y. City. Filed Jan'y 23, '74.

UNITED STATES OF AMERICA,
Southern Dist. of New York, ss:

3 I, Kenneth G. White, clerk of the circuit court of the United States for the southern district of New York, second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to fifty-six, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of George M. Wheeler, plaintiff in error, agt. John Sedgwick, assignee, &c., defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 5th day of October, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the said United States the ninety-ninth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the district court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court, before you, between John Sedgwick, assignee in bankruptcy of Frederick S. Comstock and James M. Wheeler, formerly composing the firm of F. S. Comstock & Co., and George M. Wheeler, a manifest error hath happened, to the great damage of the said George M. Wheeler, as is said, and as appears by his complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the circuit court of the United States, at the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the third Monday of October next, that, the record and proceedings aforesaid being inspected, the said judges of the circuit court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Nathan Clifford, associate justice of the Supreme Court of the United States, this day of June, in the year of our Lord one thousand eight hundred and seventy-three, and of the Independence of the United States the ninety-seventh.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed.
June 20, 1873.

SAM'L BLATCHFORD.

5 (Indorsed:) 1—316. United States district southern district of New York. In bankruptcy. John Sedgwick, assignee, vs. George M. Wheeler. Writ of error. Goodrich & Wheeler, attys. for deft., 59 Wall st. Filed June 20th, 1873.

The return to the within writ appears in the following papers and proceedings.

N. Y., Oct'r 20, 1873.
[SEAL.] GEO. F. BETTS, *Clerk.*

6 United States dist. court, southern dist. of N. Y.

JOHN SEDGWICK, ASS'NEE, &C., *agt.* GEORGE M. WHEELER.

Bill of exceptions.

The pleadings in this action will be found in the judgment-roll.

The action was tried before the Hon. Samuel Blatchford and a jury, at the city of New York, on the 18th day of November, 1872.

FREDERICK S. COMSTOCK, being called on behalf of the plaintiff and sworn, testified that he was one of the members of F. S. Comstock &

Co., stock-brokers in New York City, a firm composed of the two bankrupts, one of whom was defendant's brother, which firm bought and sold stocks for the defendant; that defendant gave him a sort of general authority, and told him if he should deem best at any time to
7 make any transaction on his account he would ratify it; that the firm went into bankruptcy, and the plaintiff was appointed assignee; that in October, 1867, a conversation took place between him and the defendant as to how much the defendant owed to Comstock & Co., and he was then asked:

"What did George M. Wheeler say in regard to paying the balance of the account at that time?"

Which question was objected to, the objection overruled, and exception taken by defendant's counsel.

To which question the witness answered: "He said he would pay for it."

The court then asked:

"How much was it stated to be at that time?"

To which he answered: "I think about $10,000; between $8,000 and $10,000. His account showed that loss at that time. Mr. S. G. Wheeler asked me if that was correct. He brought the figures, and George says the account stands so and so."

Which was objected to by defendant's counsel, the objection
8 overruled, and an exception taken.

He further testified that account were rendered to the defendants; that he rendered and account himself, but could not tell when; one or two accounts himself personally; that subsequent to October, 30th, 1867, he had conversations with defendant as to the state of his accounts, and defendant did not make any objection to the account; that the purchases and sales made for the defendant are correctly stated in the ledger of F. S. Comstock & Co., and was then asked this question:

"Did he (the defendant) have access to that account in your books?"

Which question was objected to by the defendant's counsel, the objection overruled, and an exception taken.

The witness answered: "He could have done so; yes, sir."

The witness also testified that the state of accounts was the subject of a conversation between them a very short time before the fail-
9 ure of F. S. Comstock & Co., and after the last transaction stated in the account, and defendant said he would pay it as soon as he could get a mortgage upon his property in the country; that the first time defendant ever objected was two or three days after F. S. Comstock & Co. failed, (it was conceded that the failure was in October, 1868,) when defendant objected, and threatened to sue the firm for selling out his Northwestern stock without positive orders.

He testified that a few days after the failure of the firm of F. S. Comstock & Co., he had a conversation with the defendant in regard to his account; that at that time no actual figures were mentioned; that the accounts handed defendant by witness were correct copies of the ledger, starting with a balance former accounts and bringing down a balance at the end of the account. That the date of the last account being rendered defendant was September 30th, 1868.

10 CHARLES J. TAPPEN, a witness on behalf of the plaintiff, testified that he was the book-keeper of F. S. Comstock & Co. Being shown a book, the witness testified that he kept the ledger of F. S. Comstock & Co., and that the entries therein were made from another book called the blotter, from information given him by Comstock, and

that he correctly entered in the blotter and transferred to the ledger such information as Mr. Comstock gave him; and he was then asked with reference to the account in the ledger in his handwriting:

"What is the balance shown to be due on that account?"

Which was objected to on the ground that it was not in any way connected with the defendant. The court ruled and decided in these words; "I will take the evidence and pass upon it by and by. I do not admit it as evidence against the defendant, but as part of the res gestæ."

The witness answered: "$22,259.70, September 30th, 1868;"
11 and further testified that the accounts were monthly made from the ledger and submitted to defendant; that he handed accounts to him personally in many instances; that he could not specify any particular date; that he did so after October, 1867, between that time and the failure, all during the fall and winter of 1867 and 1868, and that he never heard defendant express any dissent; that if defendant did not take them from the pigeon-hole in Comstock & Co.'s office, they were handed to him in common with every other customer.

F. S. COMSTOCK, being recalled, was asked if he had heard Tappen's testimony in regard to the sources from which he made the entries of this book; that he made those entries on your statements of the transactions, and was asked this question:

"Will you tell the jury whether these statements were correct in point of fact?"

Which question was objected to by the defendant's counsel.
12 The court thereupon inquired of plaintiff's counsel: "The testimony refers to the number of shares, the prices, and the fact of a sale without reference to whom it was for, also a description of the stock;" and was answered by the plaintiff's counsel in the affirmative.

Objection overruled and exception taken.

The witness answered: "Yes, sir; it is correct."

He was also asked:

"Did you also state the person for whom the transaction was made?"

Which question was objected to by defendant's counsel. The objection overruled and exception taken.

The witness answered in the affirmative, and further testified that the transactions took place as stated by Mr. Tappen.

He was also asked:

"Now state to the jury whether the transactions which you stated to him as having been made for the account of George M. Wheeler
13 were made under the authority and circumstances which you have before stated?"

Which question was objected to by defendant's counsel. Objection overruled and exception taken.

The witness answered, "Yes, sir."

Plaintiff read in evidence a copy, duly certified by the clerk of the court under the seal thereof, of the assignment made by the register to him as assignee.

Plaintiff then rested.

The defendant called as a witness George M. Wheeler, the defendant, who produced two accounts rendered to him by F. S. Comstock & Co. about September and October, 1867, and which were marked respectively "Exhibit No. 1," and "Exhibit No. 2," and read in evidence, as follows:

Date.			Amount.	Days.	Interest.	Date.		Amount.	Days.	Inter.
Aug. 31	100 Ft. Wayne	$10,000 00				Sept. 2	Div. 100 P. Mail	300 00	28	1.63
	200 Pac. Mail	28,761 00				3	Charge Chic. acct	100 00	27	0.52
	100 Hudson River	13,150 00				3	Coup. 4 M 10.40's	141 00	27	0.73
	100 M'ch. Southern	7,587 00				7	100 P. M., 145	14,486 05	23	64.78
	400 Clev. & Pitts	16,548 00				10	300 Chic. & N. W., 45½	13,611 13	20	52.92
	500 Chic. & N. W	21,809 00				11	100 Hudson R., 131½	13,136 18	19	48.52
	200 Clev. & Tol	12,700 00				17	Div. 400 Clev. & Pitts	1,000 00	13	2.53
	7 M 5.20's					18	100 Pac. M., 143¾	14,361 06	12	33.50
	4 M 10.40's					20	100 Chic. & N. W., 41¼	4,099 58	10	7.97
	22 N. L. & N. R. R. Co	2,530 00	120,659 18	30	703 84	20	100 do., 41¼	4,099 58	10	7.97
		113,085 00								
Sept. 5	Cash 2 vouchers		191 25	25	0 92	21	100 P. Mail, 139¼	13,936 10	9	24.38
13	5 M gold 145½		7,293 75	17	24 11	21	100 Mich S., 75⅝	7,549 24	9	13.22
13	100 Pac. Mail, 143½	15 d. int.	14,398 38	17	47 60	21	100 Chic. & N. W., 38¾	3,874 61	9	6.78
14	5 M gold 145		7,256 25	16	22 56	23	100 Chic. & N. W., 38⅝	3,849 61	7	5.23
20	100 P. Mail, 141⅜	7 d. int.	14,204 03	10	27 61	23	100 Chic. & N. W., 38¾	3,862 11	7	5.25
20	300 Chic. & N. W., 45⅝	10 d. int.	13,747 82	10	21 27	24	100 Chic. & N. W., 38¾	3,862 11	6	4.50
27	200 Clev. & Pitts., 79¼		7,987 50	3	4 65	30	Bal. interest			576.09
28	100 Chic. & R. I., 102		10,212 50	2	3 96		Balance	94,258 14		
30	Int. on acct., 7 p. ct.		576 09							
			$196,526 50		$856 52			196,526 50		$856.52
15 Sept. 30	Balance		$94,256 14			Sept. 30	100 Chic. & N. W. short			
	100 Ft. Wayne	$10,250								
	100 Pac. Mail	14,100								
	600 Cleve. & Pitts	23,850								
	200 Clev. & Tol	12,850								
	12 M gold	14,500								
	100 Chic. & R. I	10,275								
	7 M 5-20's	7,000								
	4 M 10-40's	4,000								
	22 N. L. & N. R. R	2,530								
		$99,355								
	2,000 Reynolds									

E. & O. E.

F. S. COMSTOCK & CO.
TAPPAN.

Exhibit No. 2, November 18th, 1872, L. B.—Mr. Geo. M. Wheeler in acct. with F. S. Comstock & Co.

Date.		Amount.	Days.	Int.	Date.		Amount.	Days.	Int.
Sept. 30	100 Ft. Wayne				Sept. 30	100 Chic. & N. W. short			
	100 Pac. Mail				Oct. 2	100 Erie, 52⅛	6,536 84	29	36 85
	600 Clev. & Pitts				4	Cash	10,000 00	27	52 50
	200 Clev. & Tol				7	100 Chic. & R. I., 103⅜	10,361 46	24	48 34
	10 M gold				8	100 Ft. Wayne, 100⅝	10,073 99	23	45 03
	100 Chic. & R. I				8	100 Chic. & N. W., 44¼	4,462 05	23	19 95
	7,000 5-20's				9	200 Clev. & Pitts., 81¾ } 16,548	8,161 68		
	4,000 10-40's				10	200 Clev. & Pitts., 84 }	8,386 66		
16 Sept. 30	22 sh. N., L. & N. R. R				Oct. 15	200 N. Y. Cent., 115¼	22,997 69	16	71 54
	2,000 Reynolds	$94,285 14	31	$566 15	15	200 Clev. & Pitts., 86	8,586 64	10	26 70
Oct. 3	200 Chic. & N. W., 42⅞	8,600 00	28	46 82	16	7,000 5-20's, delivered			
5	100 Erie, 65⅜	6,587 50	26	33 28	16	4,000 10-40's, deliv'd			
5	½ p. ct. for Crys. stock	116 50	26	57	16	Div. 100 Ft. Wayne	250	15	72
8	Cash	4,000 00	23	17 69	31	Balance int			404 21
8	100 N. Y. Cent., 114⅝	11,450 00	23	51 21	31	Balance	53,049 34		
10	100 N. Y. Cent., 114⅝	11,450 00	21	46 75					
22	50 Clev. & Tol., div. on 200								
22	Cash	6,000 00	9	10 50					
31	Int. on acct, 7 p. ct	404 21							
		$142,866 35		$774 97			$142,866 35		774 97
Date.									
	Balance	$53,049 34							
	100 Pac. Mail 14 600								
	250 Clev. & Tol 13,000								
	10 M gold 14,100								
	22 N. L. & N. R. R 2,530								
		$14,230							
	2,000 Reynolds.								

E. & O. E.

F. S. COMSTOCK & CO.
C. J. TAPPEN.

17 Witness further testified that these were the only accounts he ever received, and that he objected to the sale of 500 of the Chicago and Northwestern stock mentioned in Exhibit No. 1 at the time that account was rendered; that those were all the items he objected to on that particular occasion; that on receipt of Exhibit No. 2 he made the same objection that he did to the other account to the sales of the Chicago and Northwestern stock in that account brought down by a balance to this; that he don't remember making any positive objection to the other items; also that he never authorized any joint transaction with Comstock of any kind whatever.

18 NOAH B. SANBORN, a witness on behalf of the defendant, testified that he attended the first meeting of creditors of F. S. Comstock & Co., and filed a proof of claim on behalf of the defendant against F. S. Comstock & Co., to the amount of $31,512.50; that Comstock was present; that witness spoke about the claim in presence of Mr. Comstock, but not to him, and don't know whether he heard it or not; that there was no objection to witness' voting, and no objection at that meeting to the claim, and the witness was asked the question—

"Did you vote on the claim as presented for the assignee?"

Which question was objected to and excluded, and an exception taken by defendant's counsel.

CHARLES J. TAPPEN being called, testified that there was an account upon the books of F. S. Comstock, entitled "G. M. Wheeler's Northwest. account;" that he furnished copies of that account to defendant

19 down to and including the end of that account as it stands on the books down to December, 1867, and January, 1868; that the last item in that account is a transfer; that the account shows a debit balance of about $12,000, and only half of it was charged against defendant's individual account, and that on the individual account of defendant there is an item transferred from the account last mentioned, "G. M. W., Chicago and Northwestern, $6,125.62," charged to the debit of the defendant, and that witness furnished defendant an account including that item on subsequent accounts, bringing down the balance in which that item was included; that he furnished defendant copies of those accounts down to September 30th, 1868.

FREDERICK S. COMSTOCK, being recalled, after defendant had rested, on behalf of plaintiff, was shown defendant's Exhibit No. 2, being the account rendered by F. S. Comstock & Co. to defendant, showing

20 the balance due from him October 31st, 1867, of $53,049.34, and testified in regard to the stocks shown by that account to be on hand at that date; that the 100 shares of Pacific Mail were sold in December, 1867, for $11,448.85, and the 250 shares of Cleveland and Toledo stock were sold on the 26th of November, 1867, for $12,595.60, the $10,000 gold was sold February 4th, 1868, for $14,286.07, all under general or special authority from defendant, and that the 22 shares of New London & Norwich Railroad stock had been pledged by the firm to S. G. Wheeler, and the 2,000 Reynolds had been delivered by him to his assignee in bankruptcy.

It had been previously proved by S. G. Wheeler that the New London and Norwich stock was worth $2,750, and by other witnesses that the Reynolds stock was valueless, and the witness was asked:

"What authority, if any, had you from George M. Wheeler to make purchases and sales of Northwestern stock in which you and he should be jointly interested?"

21 Which question was objected to by defendant's counsel on the ground that it is not in rebuttal and not within the purview of the issues to be tried here. The objection was overruled and an exception taken by defendant's counsel. This question was not answered by the witness, and other questions were asked which were not objected to; in reply to which the witness testified that the firm of F. S. Comstock & Co. had transactions in Northwestern stock for and on account of George M. Wheeler and by his authority, aside from that mentioned in Exhibits Nos. 1 and 2; that there was an agreement between witness and defendant of which witness' partner was ignorant; that if the account showed a profit witness would take half of the profit when they closed it up, and if the account showed a loss witness would stand one-half of the loss; that those transactions extended to January 31st, 1868, and in fact re-
22 sulted in a loss of $12,251.23, which loss was shown by the account headed "G. M. W., Chic. and N. W. account," on F. S. Comstock & Co.'s books, transferring one-half this loss to defendant's individual account and to the debit of defendant of $6,125.62 for one-half of this loss, and the other one-half was in like manner transferred to witness' account.

He was also asked: "How soon after the sale of the 500 shares of the Northwestern stock which Mr. Wheeler says he objected to, did you have any conversation with him on the subject of the sale."

"Was anything said in the conversation in regard to buying it back?"

Both of these *objections* were objected to as going into the original case. The objection was overruled and an exception taken by defendant's counsel.

CHARLES J. TAPPAN, being recalled, made a calculation of interest as follows:

Balance shown by Ex. No. 2:

23 October 31st, 1867		$33,049 34
Interest to day of trial		21,857 64
One-half G. M. W., Northwestern %		6,125 62
Interest		2,348 78
		$83,381,38
Proceeds of 100 Pac. Mail	$11,448 85	
Interest	4,476 74	
Proceeds of 250 Toledo	12,585 60	
Interest	4,991 31	
Proceeds of $10,000 gold	14,286 07	
Interest	5,411 21	
Value of 22 N. L. & N.	2,750 00	
Interest	962 50	
		56,922 28
		$26,458 90

There was no evidence as to the items and particulars of the work and labor, care and diligence, which the said F. S. Comstock & Co. performed and bestowed in and about his business and at his special request, or of the money paid, laid out, and expended by the said F. S. Comstock & Co. for the defendant, other than the statements thereof in the accounts rendered defendant, and proof that he did not at any time object to such statements in that respect.

24 Part of the amount included in the verdict found by the jury was the sum of $6,125.62 and interest, being one-half of the amount shown to be due on the account headed "G. M. W., Chicago and Northwestern account," hereinbefore referred to in F. S. Comstock's testimony, that if the account showed a profit witness would take half of the profit

when they closed it up, and if the amount showed a loss witness would stand one-half the loss.

After the testimony was closed, the counsel for the defendant asked the court to direct a verdict for the defendant, on the ground that the action was on assumpsit for work and labor and money advanced, and also on an account stated. There was no proof whatever of an account stated, and there was no proof of the items to maintain an action in assumpsit; which was denied and an exception taken by the defendant.

The judge then charged the jury and said:

This, gentlemen, is an action brought by the assignee of Com-
25 stock & Co. to recover from the defendant a balance claimed to be due for stocks bought and sold by Comstock & Co. for the defendant.

The only question in this case is whether Comstock & Co. had authority to buy and sell for defendant the stocks mentioned in the testimony, and, if they had no such authority, whether the purchases and sales of those stocks by Comstock & Co. was ratified by the defendant.

You must find either for the plaintiff or the defendant. If you find for the defendant he would not be entitled to a judgment against the plaintiff in this action for any balance due for the wrongful sale of the stock. If you find for the plaintiff on all the questions in dispute, then you must assess the damages in the sum of $\$26{,}458\frac{99}{100}$ *dollars*, and bring in your verdict in his favor for that amount. It is a principle of law, gentlemen, that even though an authority was not given by a principal to an agent, who claims to have exercised that author-
26 ity, it may be ratified after, and a ratification is equivalent to an original authority; but the ratification must be established, must be clear, must be satisfactory in order to be equal in value to an original authority, and you have in this case this question of the original authority; and if there was no original authority in the case, then the question of whether there was a ratification after a knowledge of the purchase or sale, and of the price at which the stock had been bought or sold, in such a manner as to amount at the time to a clear ratification. That is a question of fact, exclusively for your judgment upon the evidence, and the same principles apply to the sale of the Pacific Mail stock and Cleveland & Toledo R. R. Co. stock, and the $10,000 in gold, in regard to which you will recollect the testimony of Mr. Comstock on one side, and of Mr. Wheeler and such other testimony as there may be on the other. I speak of the testimony of Comstock
27 as the testimony on the part of the plaintiff, not forgetting the testimony of the book-keeper, which, however, as I recollect it, did not go at any time to the extent of showing any authority directly given, or any direct conversation between Mr. Comstock and the defendant, but was confined to his entries in the books in accordance with the directions of Mr. Comstock and with the course of business in the establishment. All these questions of fact in regard to the authority and ratification respecting the Northwestern stock and the question of authority in respect to the Pacific Mail and the Cleveland and Toledo and the gold are necessarily in the testimony somewhat connected, because you will recollect the testimony of Mr. Comstock, that, in respect to *some* or two, or perhaps (in the view you may take) all of these three parcels of stock that were sold afterwards, the authority referred to was the same general authority for sale under which he regarded him-
28 self as authorized originally to sell, as he stated, the Chicago and Northwestern stock irrespective of any question of ratification afterwards in regard to the Chicago and Northwestern stock, because I

do not understand it to be claimed that after the sale of the Pacific Mail and the Cleveland and Toledo, and the gold, there were any conversations between the parties which are relied upon as a ratification, a particular ratification of the sales of those three stocks, irrespective of the authority given to sell them.

So that the question in regard to the purchases and sales of these stocks reduces itself down simply, gentlemen, to the question of authority, whether original or ratified. If there was no such authority, why, then, the defendant is entitled to your verdict.

If there was such authority the plaintiff is entitled to your verdict, and this one thing is to be borne in mind in viewing the testimony. The burden of proof is upon the plaintiff to establish to your satisfac-
29 tion, or by a fair preponderance of evidence, that he is entitled to recover in regard to all the matters in dispute, which involve the proposition that Comstock and Wheeler were authorized to sell these stocks, either by original authority or by a ratification, as you may find the evidence to be. I am asked to charge you by the defendant that the books of Messrs. Comstock & Co. are no evidence in this case. That is true. I do charge you so. They have not been put in evidence. They have not been allowed in evidence.

The defendant's counsel excepted to the ruling that the plaintiff is entitled to recover $26,458.90.

GOODRICH & WHEELER,
Deft.'s Attys.

(Indorsed:) District court. John Sedgwick, ass'nee, &c., vs. George M. Wheeler. Copy bill of exceptions. Goodrich & Wheeler, deft.'s attys.

We assent to the settlement of the within bill of exceptions in manner and form as within stated.

C. W. BANGS,
Plff.'s Atty.

Goodrich & Wheeler, deft.'s attys. Settled, S. B. Filed October 20th, 1873.

30 Pleas before the district court of the United States of America, held in and for the southern district of New York in the second circuit, at the court-house in the city of New York, of the term of January, A. D. 1871.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that on the seventeenth (17th) day of December, A. D. 1870, at the city of New York, in the district aforesaid, before the district judge of the United States for the district aforesaid, comes John Sedgwick, as assignee in bankruptcy of Frederick S. Comstock and James M. Wheeler, plaintiff in this cause, by Charles W. Bangs, his attorney, and now here brings into the said court, before the said judge. his certain bill against George M. Wheeler, defendant in this cause, in custody, &c., of a plea of debt, &c., and which said bill follows in
31 these words, to wit:

In the district court of the United States for the southern district of New York, January term, to wit, the second day of January, in the year one thousand eight hundred and seventy-one.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

John Sedgwick, of the city of New York, as assignee in bankruptcy of Frederick S. Comstock and James M. Wheeler, formerly copartners composing the firm of F. S. Comstock & Co., plaintiff, by Charles W. Bangs, his attorney, complains, pursuant to an act of the Congress of the United States, approved March 2d, 1867, entitled "An act to establish a uniform system of bankruptcy throughout the United
32 States," against George M. Wheeler, of the city of New York, defendant, now in custody, &c., of plea for trespass on the case upon premises.

First. In that whereas heretofore, to wit, on or about the thirtieth day of September, 1868, to wit, at the city and county of New York, within the southern district aforesaid, the said defendant, George M. Wheeler, was indebted to the said F. S. Comstock & Co. in the sum of forty-four thousand five hundred and nineteen dollars and forty cents, lawful money of the United States, for work and labor, care and diligence of the said F. S. Comstock & Co., before that time done, performed, and bestowed in and about the business of the said defendant, and at his special instance and request; and in the further sum of forty thousand five hundred and nineteen dollars and forty cents, of like lawful money, as aforesaid, for so much money before that time lent and advanced by the said F. S. Comstock & Co. to the said defendant,
33 and at the like request of the said defendant; and for other money by the said defendant before that time had and received, to and for the use of the said F. S. Comstock & Co.; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook, and then and there faithfully promised the said F. S. Comstock & Co. well and truly to pay the said F. S. Comstock & Co. the said several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested. And the said plaintiff saith that thereupon afterwards, to wit, on or about the 20th day of December, 1868, to wit, at the city and county of New York, within the southern district aforesaid, the plaintiff became and was duly appointed to be the assignee in bankruptcy of the estate and effects of the said F. S. Comstock & Co., pursuant to the said act of Congress, whereby, and by force of
34 the said act, the right to have and recover the said sums of money vested in the said plaintiff, whereof the said defendant had due notice.

Second. And also for that, whereas, heretofore, to wit, on or about the said thirtieth day of September, 1868, to wit, at the city and county of New York, within the southern district aforesaid, the said F. S. Comstock & Co., and the said defendant accounted together of and concerning diverse other sums of money before that time due and owing from the said defendant to the said F. S. Comstock & Co., and then and there being in arrear and unpaid; and upon such accounting the said defendant then and there was found in arrear and indebted to the said F. S. Comstock & Co. in the further sum of forty-four thousand five hundred and nineteen $\frac{45}{100}$ dollars of like lawful money as aforesaid. And being so found in arrear and indebted to the said F. S. Comstock & Co., the said defendant, in consideration thereof, afterward, and on the
35 same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said F. S. Comstock & Co., well and truly to pay unto the said F. S. Comstock & Co. the said sum of money last above mentioned, when thereunto afterward requested. And the said plaintiff further, in fact, says, that afterward, to

wit, on or about the twentieth (20th) day of December, eighteen hundred and sixty-eight (1868,) to wit, at the city and county of New York, in the southern district aforesaid, the plaintiff was, pursuant to the said act of Congress, duly appointed to be the assignee in bankruptcy of the estate and effects of the said F. S. Comstock & Co., whereby, and by force of the said act, the right to have and recover the said last-mentioned sum of money has become vested in the said plaintiff, whereof the said defendant had due notice. But nevertheless the said defendant, although often requested, never did pay the said several sums of money above mentioned, or any or either of them to the said F. S. Comstock & Co., nor to the plaintiff as aforesaid, but to pay the same or any
36 part thereof to the said F. S. Comstock & Co., or to the said plaintiff, as assignee as aforesaid, the said defendant altogether neglected and refused, and still neglects and refuses, to the damage of said plaintiff ninety thousand dollars, ($90,000,) wherefore he brings this suit, &c.

And the said George M. Wheeler, by Goodrich & Wheeler, his attorneys, comes and defends the wrong and injury when, &c., and says that he did not undertake and promise in the manner and form as the said John Sedgwick, assignee, &c., hath above thereof complained against him, the said George M. Wheeler, and of this he puts himself upon the country. And the said plaintiff doth the like.

Thereupon it is ordered by the court that the issue above joined, be tried at a term of the said district court, appointed to be held at the city of New York on the eighteenth day of November, A. D. 1872, at
37 which day and place, before the honorable Samuel Blatchford, judge of the said district court, come the above-named plaintiff, by his attorney above named, and the above-named defendant, by his attorneys above mentioned; and the jurors of the jury summoned to try the above issue, being called, also come, who to speak the truth of the matters within contained and a true verdict thereon to give, being chosen, tried, and sworn, say, upon their oath, that the said defendant did undertake and promise in manner and form as the said plaintiff hath above complained against him, and they assess the damages of said plaintiff, by reason of the premises, over and above his costs and charges in this behalf expended, at the sum of twenty-six thousand four hundred and fifty-eight dollars and ninety cents, ($26,458.90,) and for the costs and charges to six cents.

And now, at this day, to wit, on the tenth day of May, A. D.
38 1873, at the term of said district court, before the said judge of court, come the parties aforesaid by their attorneys aforesaid, and the said defendant, by his said attorneys, now moves the said court for a new trial of this cause and of said issue therein, upon a case made herein, which was filed with clerk of said district court.

And the said parties, by their counsel, being now duly heard upon the said case before the said district judge, the said judge does now, to wit, on said tenth day of May, A. D. 1873, all and singular the premises being seen, and by the court here fully understood, and mature deliberation being thereupon had, deny said motion for a new trial, if and upon condition that said plaintiff should make and file herein a stipulation consenting to deduct from the recovery herein, the sum of three thousand and eighty-seven dollars and thirty-three cents, ($3,087.33,) the amount of an error in the calculation of interest included in the verdict herein, and interest thereon from the date of the said verdict, and
39 the said plaintiff thereupon makes and files with the clerk of the said district court a stipulation of which the following is a copy, to wit:

"U. S. district court.

"JOHN SEDGWICK, ASS'NEE, &C.,
"*agst.*
"GEORGE M. WHEELER. } At law.

"The court having decided to grant the defendant's motion for a new trial unless the plaintiff would deduct from his recovery the sum of three thousand and eighty-seven dollars and thirty-three cents, ($3,087.33,) the amount of an error in the calculation of interest included in the verdict, and if such deduction was made, to deny the motion, thereupon the plaintiff files this his stipulation and consent to deduct from the verdict rendered herein, and from the judgment entered herein in his favor against the defendant March 11th, 1873, and to credit on
40 every execution which may be issued to collect the said judgment, the said sum of three thousand and eighty-seven dollars and thirty-three cents ($3,087.33) and interest thereon from the date of the verdict, November nineteenth, (19th,) 1872.

"Dated May 7th, 1873.

"C. W. BANGS,
"*Plaintiff's Attorney.*"

And thereupon the said court now makes an order herein, of which the following is a copy, to wit:

"At a term of the district court of the United States for the southern district of New York, held at the court-rooms thereof, No. 41 Chambers street, in the city of New York, on the tenth day of May, A. D. 1873, present, Hon. Samuel Blatchford, J.

"JOHN SEDGWICK, AS ASS'NEE, &C.,
"*agst.*
"GEORGE M. WHEELER. } At law.

41 "The defendant having moved for a new trial on the case made herein, on hearing Mr. Goodrich and Mr. Da Costa, of counsel for defendant, in support of the motion, and Mr. North, of counsel for plaintiff, in opposition thereto, and the plaintiff having filed the stipulation consenting to deduct from the recovery herein the sum of three thousand and eighty-seven dollars and thirty-three cents, ($3,087.33,) the amount of an error in calculation of interest included in the verdict herein, and interest thereon from the date of the verdict, now, on motion of C. W. Bangs, plaintiff's attorney, it is ordered that the defendant's motion for a new trial be and the same is hereby denied.

(Signed) "SAM'L BLATCHFORD."

A true copy of the original on file.
[L. S.] GEO. F. BETTS, *Clerk.*

42 And thereupon the said plaintiff, before the said district judge, now here freely remits to said defendant the sum of three thousand and eighty-seven dollars and thirty-three cents, ($3,087.33,) part and parcel of the damages aforesaid, by the jurors aforesaid, in form aforesaid found, and prays judgment for his said debt, and for the residue of the damages aforesaid by the jurors aforesaid, in form aforesaid found.

And now, at this trial and place, to wit, at the city of New York, on

the tenth day of June, A. D. 1873, before the district judge aforesaid, come the parties aforesaid, by their attorneys aforesaid, and all and singular the premises being seen, and by the court now here fully understood, and mature deliberation being thereupon had—

It is considered that the plaintiff, as assignee in bankruptcy of Frederick S. Comstock and James M. Wheeler, recover against the said defendant, George M. Wheeler, his debt and damages aforesaid, by
43 the jurors aforesaid, in form aforesaid, found, less the said sum of three thousand and eighty-seven dollars and thirty-three cents, ($3,087.33,) remitted to the said defendant as aforesaid, being the sum of twenty-three thousand three hundred and seventy-one dollars and fifty-seven cents, ($23,371.57,) and also the sum of nine hundred and eighty-eight dollars and ninety-four cents ($988.94) for his, said plaintiff's, costs and charges of increase upon the residue of said debt and damages not remitted as aforesaid, by the court now adjudged here to the said plaintiff as assignee as aforesaid, with his assent; which said damages, costs, and charges in the whole amount to the sum of twenty-four thousand three hundred and sixty dollars and fifty-one cents, ($24,360.51.)

And the said defendants in mercy, &c.

Judgment signed the 12th day of June, A. D. 1873.

GEO. F. BETTS, *Clerk.*

44 (Endorsed:) 1–316. United States district court, southern district of New York. John Sedgwick, as assignee, &c., agst. George M. Wheeler. Judgment record. C. W. Bangs, attorney for plaintiff. Debt and damages, $23,371.57; costs and interest, 998.94—$24,360.51. Filed June 12th, 1873, at 3 o'clock p. m. Filed and judgment docketed June 12th, 1873, at 3 o'clock p. m.

(Indorsed:) U. S. circuit court, southern district of New York. In equity. John Sedgwick, assignee, &c., ads. George M. Wheeler. Writ of error & return. Filed Oct. 20, 1873.

45 Know all men by these presents that we, George M. Wheeler, Samuel G. Wheeler, jr., and William Bailey Lang are held and firmly bound unto John Sedgwick, as assignee in bankruptcy of F. S. Comstock and others, in the sum of twenty-six thousand dollars, to be paid to the said John Sedgwick as assignee as aforesaid, his executors, administrators, or assigns; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the sixteenth day of May, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas George M. Wheeler, plaintiff in error, has sued out a writ of error to the circuit court of the United States for the southern district of New York, in the second circuit, from a judgment of the district court of the United States for the said southern district, bearing date the eleventh day of March, 1873, in a suit in which John Sedgwick, as assignee of F. S. Comstock and others, is plaintiff, against George M. Wheeler, defendant:

Now, therefore, the condition of this obligation is such that if
46 the above-named George M. Wheeler, plaintiff in error, shall prosecute said writ of error with effect and pay all damages and costs which shall be awarded against him as such plaintiff in error

therein, if he shall fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

G. M. WHEELER. [L. S.]
S. G. WHEELER, JR. [L. S.]
W. B. LAND. [L. S.]

Sealed and delivered and taken and acknowledged the 16th day of May, 1873, before me.

GEO. F. BETTS,
U. S. Commissioner.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Samuel G. Wheeler, junior, and William Bailey Lang, being duly sworn, each depose and say that he resides in the southern district of New York, and that he is worth the sum of fifty-two thousand dollars over and above all his just debts and liabilities.

S. G. WHEELER, JR.
W. B. LANG.

Sworn to this 16th day of May, A. D. 1873, before me.

GEO. F. BETTS,
U. S. Commissioner.

47 This bond approved as to form and amount and sufficiency of surety.

Dated New York, May 16, 1873.

(Signed) SAM'L BLATCHFORD,
District Judge.

Approved:

C. W. BANGS,
Plff's Atty.

(Endorsed:) United States circuit court for the southern district of New York, in the second circuit. George M. Wheeler, plff. in error, vs. John Sedgwick, assignee. Bond for damages and costs on writ of error. Goodrich & Wheeler, attorneys for plff. in error, 59 Wall st. Filed May 16th, 1873.

48 Circuit court of the United States, southern district of New York.

GEORGE M. WHEELER, PLFF. IN ERROR,
agt.
JOHN SEDGWICK, AS ASS'EE, DEFT. IN ERROR.

Please enter our appearance as solicitors for John Sedgwick, as assignee, &c., defendant in error, in the above-entitled action.

Yours, &c.,

BANGS & NORTH,
Solicitors for John Sedgwick, Assignee, Deft. in Error.

To KENNETH G. WHITE, Esq., *Clerk.*

(Endorsed:) U. S. circuit court, southern dist. of New York. George M. Wheeler, plff. in error, agt. John Sedgwick, assignee, &c., deft. in error. Notice of appearance. Bangs & North, sol'rs for deft. in error. Filed Oct. 2, 1873.

49 Afterwards, to wit, on the third Monday of October, in the same term, before the circuit court of the United States for the southern district of New York, in the second circuit, at the United States court-rooms in the city of New York, comes the said George M. Wheeler, plaintiff in error, by his attorneys, Goodrich & Wheeler, and the said John Sedgwick, assignee, defendant in error, by his attorneys, Bangs & North, also comes.

Whereupon all and singular the premises being seen, and by the said circuit court of the United States for the southern district of New York in the second circuit, now here fully understood, and as well the record and proceedings aforesaid as the matters aforesaid by the said George M. Wheeler for error assigned being by the said circuit court now here diligently examined and inspected, and due and mature deliberation being thereupon had, it appears to the said circuit court now here that there is no error, either in the record and proceedings aforesaid or in giving the judgment aforesaid.

50 Therefore it is considered by the said circuit court of the United States for the southern district of New York, in the second circuit, now here, that the judgment aforesaid, in form aforesaid given, be in all things affirmed and stand in full force and effect, the said causes and matters above for error assigned and alleged in anywise notwithstanding, &c.

And it is further considered by the said circuit court of the United States for the southern district of New York, in the second circuit, now here, that the said John Sedgwick, assignee, do recover against the said George M. Wheeler as well his damages aforesaid, to wit, the sum of twenty-four thousand three hundred and sixty dollars and fifty-one cents, ($24,360.51,) as also eight hundred and seventy-one $\frac{55}{100}$ dollars for his damages for his delay, and also thirty-one dollars and thirty cents by the said circuit court of the United States for the southern district of New York, in the second circuit, now here adjudged to the said John

51 Sedgwick, assignee, with his assent, for his costs and charges, which he hath expended about his defence on the prosecution of the said writ of error, according to the act of Congress in such case made and provided, which said damages, costs, and charges in the whole amount to twenty-five thousand two hundred and sixty-three dollars and thirty-six cents, and that he, the said John Sedgwick, assignee, have execution therefor; and the said George M. Wheeler, in mercy, &c.

Judgment signed this 16th January, 1874.

R. E. STILWELL,
Dep. Clerk.

52 At a stated term of the circuit court of the United States for the southern district of New York, held at the U. S. court-rooms, in the city of New York, on the third Monday of October, 1873—present, hon'ble Lewis B. Woodruff, circuit judge.

JOHN SEDGWICK, ASS'EE, &C., DEFENDANT IN error, *ads.* GEORGE M. WHEELER, PLAINTIFF IN ERROR. } January 9, 1874.

This cause coming on to be heard on the writ of error, and the transcript of the records for the district court of the United States for the southern district of New York, and having been argued by counsel, on consideration thereof, and on motion of Bangs & North, attorneys for

defendants in error, it is ordered and adjudged by this court that the judgment of the district court in this cause be, and the same is hereby, in all things affirmed; that the defendant in error recover against
53 the plaintiff in error, as well his damages aforesaid in the said judgment awarded, as just damages for the delay at the rate of seven per cent. per annum, and also his costs in defending the writ of error in this cause, according to the form of the act of Congress in such case made and provided, to be taxed, and that he have execution thereof, &c.

(Signed) L. B. WOODRUFF, *Circuit J.*

(Endorsed:) U. S. circuit court court. John Sedgwick, ass'ee, &c., deft. in error, ads. George M. Wheeler, plff. in error. Order affirming judgment of district court. C. W. Bangs, solr. for deft. in error. Filed Jan'y 20, 1874.

54 Circuit court of the United States of America, for the southern district of New York, in the second circuit.

GEORGE M. WHEELER, PLTFF. IN ERROR,
vs.
JOHN SEDGWICK, ASSIGNEE IN BANKRUPTCY of Frederick S. Comstock and James M. Wheeler, formerly composing the firm of F. S. Comstock & Co., defendant in error.
} Bond for costs.

Know all men by these presents, that we, George M. Wheeler, Samuel G. Wheeler, jr., and William Bailey Lang, are held and firmly bound unto the above-named John Sedgwick, assignee, &c., in the sum of fifty-three thousand ($53,000) dollars, to be paid to the said John Sedgwick, ass'ne; for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the day of January, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas the above-named George M. Wheeler has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named George M. Wheeler shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make his plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

G. M. WHEELER. [L. S.]
S. G. WHEELER, JR. [L. S.]
W. BAILEY LANG. [L. S.]

Sealed and delivered, and taken and acknowledged this 23 day of January, 1874, before me.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

55 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Samuel G. Wheeler, jr., and Wm. Bailey Lang, being duly sworn, each

for himself, depose' and says that he is worth the sum of fifty-three thousand dollars, over and above all his just debts and liabilities.

S. G. WHEELER, JR.
W. BAILEY LANG.

Sworn to this 23d day of January, A. D. 1874, before me.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

The foregoing bond is approved as to form and amount, and the sufficiency of the sureties, January 23d, 1874.

SAM'L BLATCHFORD, *D. J.*

(Indorsed:) Vol. ½, page ½; U. S. circuit court. George M. Wheeler, pltff. in error, vs. John Sedgwick, assignee, &c., deft. in error. Bond for costs on . Goodrich & Wheeler, attys. for pltffs. in error. *Proctor.* Filed this 23 day of January, 1874.

56 UNITED STATES OF AMERICA, *ss:*

To John Sedgwick, assignee, &c., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October, 1874, next, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein George M. Wheeler is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Blatchford, judge of the circuit court of the United States for the southern district of New York, this twenty-third day of January, in the year of our Lord one thousand eight hundred and seventy-four.

SAM'L BLATCHFORD.

57 CITY & COUNTY OF NEW YORK, *ss*·

, being duly sworn, says that on the day of January, 1874, he served the within citation on C. W. Bangs, attorney for defendant in error herein by .

(Indorsed:) U. S. Supreme Ct. · George M. Wheeler, pltff. in error, agt. John Sedgwick, assignee, &c., deft. in error. Citation. Goodrich & Wheeler, for pltff. in error. Filed January 23d, 1874. Service of a copy admitted January 23d, 1874. C. W. Bangs, atty. for deft. in error.

(Indorsement on cover:) No. 103. George M. Wheeler, plaintiff in error, vs. John Sedgwick, assignee of F. S. Comstock & James M. Wheeler, bankrupts. S. New York C.C. U.S. Filed 8th October, 1874.

1 SUPREME COURT OF THE UNITED STATES.

No. 103.

OCTOBER TERM, 1876.

GEORGE M. WHEELER, PL'FF IN ERROR,

vs.

JOHN SEDGWICK, ASSIGNEE, &c., DEFENDANT IN ERROR.

STIPULATION OF COUNSEL.

It is consented that the transcript of the record in this cause from the circuit court of the United States for the southern district of New York may be amended by inserting in the first count of the declaration, after the words "at the like request of the said defendant," in fo. 33 of said record as printed, these words: "and for other money before that time paid, laid out, and expended by the said F. S. Comstock & Com-
2 pany for the said defendant, and at the like request of the said defendant," it being admitted as matter of fact that those words were in the original declaration, and were in the transcript of the record sent from the district court to the circuit court, but were by inadvertence omitted from the transcript of the record sent from the circuit court to the Supreme Court.

It is also consented that said transcript be further amended by inserting therein, at fo. 36 as printed, a notice served by the defendant with his plea, and which was in the original record, and which appears to have been omitted from said transcript, as follows:

"District court of the United States for the southern district of New York.

"JOHN SEDGWICK, ASSIGNEE, &c., }
vs.
"GEORGE M. WHEELER. }

3 "SIR: Take notice that the above-named defendant at the trial of this cause will give in evidence and insist that the above-named bankrupts, before and at the time of the commencement of this action, and at the time the said Frederick S. Comstock and James M. Wheeler being declared bankrupts, as in said complaint is alleged, were and still are indebted to the said defendant in the sum of one hundred thousand dollars, lawful money of the United States, to wit, good

dollars, for damage for the conversion and unlawful sale by the said F. S. Comstock & Company of stocks belonging to the said defendant, being certain of the stocks mentioned in the plaintiff's bill of particulars.

4 "Which damages the defendant will recoup and set off against any claim which the plaintiff may recover against him herein.

"GOODRICH & WHEELER,
"*Def't's Att'ys.*

"To C. W. BANGS, Esq.,
"*Pl'ff's Att'y.*"

New York, Oct. 10, 1867.

THOS. M. WHEELER,
Pl'ff's Att'y.

F. N. BANGS,
Att'y for Def't in Error.

O

U. S. Supreme Court.

GEORGE M. WHEELER,
Pltff. in error,

vs.

JOHN SEDGWICK, Assignee, &c.,
Defendant in Error.

This is an action brought by John Sedgwick as assignee of F. S. Comstock & Co., against George M. Wheeler, in the District Court of the United States for the Southern District of New York.

There are two counts in the declaration, the first count (fol. 32) is "for work and labor, care and diligence of the said F. S. Comstock & Co., before that time done, performed and bestowed in and about the business of the said defendant," and "for so much money, before that time, lent and advanced by the said F. S. Comstock & Co., and at the like request of the defendant, and for other money before that time paid, laid out and expended by the said F. S. Comstock & Co., for the said defendant, and at the like request of said defendant, and for other money by the said defendant before that time had and received to and for the use of the said F. S. Comstock & Co."

The second count of the declaration (fol. 34) is upon an account stated.

The answer (fol. 36) is a general denial and a notice of recoupment and set off.

The facts in this case, as shown by the testimony, are that F. S. Comstock & Co., were stock brokers, in the City of New York, who bought and sold stocks for Wheeler (fol. 6); that they rendered to Wheeler two

accounts of their transactions (fols. 13–17), who, at the time, objected to these accounts (fol. 17); that these accounts were the subjects of conversation between the parties, but at no time was any definite balance spoken of or agreed upon (fols. 7 & 9); that there was no evidence as to the items and particulars of the work and labor, care and diligence, which the said F. S. Comstock & Co. performed and bestowed in and about his business, and at his special request, or of the money paid, laid out and expended by the said F. S. Comstock & Co., for the defendant, other than the statements thereof in the accounts rendered the defendant, and proof that he did not, at any time, object to any such statements in that respect" (fol. 23) which proof was that Wheeler at the time of receiving the accounts, objected to certain items therein, but did not remember making any positive objections to the other items (fol. 17.)

There was also embraced in the claim and included in the verdict an account which was called "G. M. Wheeler's Northwest Account," and which was an account of F. S. Comstock & Co. against G. M. Wheeler and F. S. Comstock jointly; the amount of the account which was charged to Wheeler was $6,125.62 (fol. 19 and 20.)

The Court instructed the jury that if they found for the plaintiff they would assess the damages in the sum of $26,458 $\frac{99}{100}$ (fol. 25), and the jury found for the plaintiff in that sum.

On a motion for a new trial, the verdict was reduced $3,078.33 (fols. 39–42.)

Errors Assigned.

The plaintiff in error assigns and specifies as errors:

First. That the Court refused to non-suit the defendant in error on the ground that there had been

no evidence to sustain the first count of the declaration, and no proof to sustain the second count of the declaration.

Second. Because there was admitted in evidence and included in the verdict one half of a joint account by F. S. Comstock & Company against F. S. Comstock and the plaintiff in error.

Third. That the consideration laid in the declaration was not proved.

Fourth. The admission of the following question: "What did George M. Wheeler say in regard to paying the balance of the account at that time?"

Fifth. The admission of the following question: "Did he have access to that account in your books?"

Sixth. The admission of the following question: "What is the balance shown to be due on that account?"

Seventh. The admission of the following question: "Will you tell to the jury whether these statements were correct in point of fact?"

Eighth. The admission of the following question: "Did you also state the person for whom the transaction was made?"

Ninth. The admission of the following question:

"Now state to the jury whether the transactions which you stated to him, as having been made for the account of G. M. Wheeler were made under the authority and circumstances which you have stated?"

Tenth. The refusal to allow the following question to be answered:

"Did you vote on the claim as presented for Assignee?"

Eleventh. The refusal of the Court to direct a verdict for the defendant, on the ground that the action was for work and labor and money advanced, and also on an account stated. There was no proof whatever of an account stated, and there is no proof of the items to maintain an action in assumpsit.

Twelfth. To the exception to the following part of the judge's charge: "If you find for the plaintiff on all the questions in dispute, then you must assess the damages in the sum of $26,458.90, and bring in your verdict in his favor for that amount."

POINTS.

First.

The first count is for work and labor, money lent and advanced, money paid, laid out and expended, and money had and received.

There is no evidence of any of this other than the accounts which have been put in evidence (fol. 23.) The accounts are at fols. 14–17.

In these accounts there are no items of work, labor and services; or of any money lent and advanced or paid out and expended, or had and received. If they are evidence of anything, they are of goods sold and delivered, but there is no count for goods sold and delivered.

The defendant at the close of the testimony moved for a non-suit (fol. 24), on the ground that there had

been no proof to sustain the first count of the declaration, which was denied and an exception taken.

This was clearly an error.

But it will be said that the accounts are evidence except as to the items specifically objected to.

But an account on its face must be correct in order to bind a person not objecting to it.

(But defendant did object. Comstock, at fol. 9, says that two or three days after his firm failed [they failed in October, 1868, and the last account is made up to October 31, 1868,] the defendant objected to these accounts.)

Look at the first account (fol. 14), under date of Sept. 28, on the Dr. side, "100 Chic. & R. I. 102, 10,212.50," whereas the amount should be 10,200. Again, on the other side, under date of Sept. 7, "100 P. M. 145, 14,486.05," whereas it should be 14,500.50. And such errors will be found to run all through both accounts.

If a set of books, which were properly admissible in evidence, were offered and were found to contain such errors, the Court would reject them, and so these accounts are not in themselves any evidence.

Comstock, the member of the firm who claims to have carried on these transactions, does not testify as to the value of the work, labor or services, and the customary charge for such services; nor does he testify that the firm paid or advanced any money for the defendant.

Second.

There was embraced in the claim and included in the verdict, one-half of an account which F. S. Comstock & Co. had against F. S. Comstock and G. M. Wheeler jointly (fol. 18).

The defendant objected to the admission of this ac-

count (fols. 20, 21), and it is also covered by the exception to the charge (fol. 29) that the plaintiff was entitled to recover $26,458.90—which amount included the amount of the joint account.

It was clearly error to admit this joint account.

The declaration was against G. M. Wheeler severally, and under that only accounts against him severally could be admitted. F. S. Comstock is not made a party defendant.

> Where there are several parties, if their contract is joint, they should all be made defendants.
>
> 1 Chitty's Plead., 29.

> In actions by or against several persons, whether ex-contractu or ex-delicto, all the causes of action must be stated to be joint.
>
> 1 Chitty's Plead., *183.

> The consequences of a misjoinder are more important than the circumstances of a particular count being defective, for in the case of a misjoinder, however perfect, the counts may be in themselves, the declaration will be had on a general demurrer, or arrest of judgment, or upon error.
>
> 1 Chitty's Plead., *187.

> This account was not included in the accounts rendered to Wheeler, and there is therefore no evidence of any work and labor, or money paid under it.

Third.

The consideration laid in the declaration is forty-four

thousand five hundred and nineteen dollars and forty cents.

There is no such consideration proved.

As to the consideration, the rule of law is that the entire identical consideration laid must be proved, neither more, less nor other.

1 Smith's Lead. Cases, 754.
5 Am. Ed. under Case of Bristow *v.* Wright.
See 1 Chitty's Plead., *362.

Fourth.

The second count of the declaration is upon an account stated. There is no evidence at all of an account stated.

A conversation took place between the parties as to the account at which a balance of $8,000 to $10,000, was spoken of. This is according to Comstock's testimony (fol. 7). According to the testimony of both Comstock and the defendant, the defendant objected to the accounts (fol. 9).

In stating an account, two things are necessary: 1st. There must be a mutual examination of the claims of each other by the parties, and 2d. *There must be a mutual agreement between them as to the correctness* of the allowance and disallowance of the respective claims, and *of the balance*, as it is struck upon the final adjustment of the whole accounts, and demands on both sides. *They must mutually concur upon the full adjustment*, and nothing short of this, in substance, will fix and adjust their respective demands as an account stated.

Lockwood *v.* Thorne, 18 N. Y., Rep. 288.

Fifth.

Various exceptions were taken at the triaf.

The first exception is at fol. 7.

Comstock was asked:

"What did George M. Wheeler say in regard to paying the balance of the account at that time?"

This question was objected to, the objection overruled, and an exception taken.

The question was an improper one, because there was no evidence of any work and labor, or of any money lent or advanced, or of any money paid and expended by Comstock & Co., for Wheeler; and it was improper, if by the question it was attempted to make out an account stated, for it appears (fol. 7) that no account was at the time stated. The exception, was, therefore, well taken.

And for the same reasons is the *second exception*, at fol. 8, well taken.

The third exception is at fol. 8.

Comstock was asked:

"Did he (the defendant) have access to that account in your books?"

Which was objected to, the objection overruled, and an exception taken.

The testimony is not competent under either count of the declaration, as tending to establish the issues thereof, but would be calculated to mislead the jury, and was improperly admitted.

The fourth exception is at fol. 10.

Charles J. Tappen was asked:

"What is the balance shown to be due on that account?"

This was objected to, and admitted as part of the *res gestae*.

Tappen was testifying from a ledger of F. S. Comstock & Co., which book was not put in evidence,

and would not have been evidence, because it was not a book of original entries (fol. 10). It is difficult to see how entries made in a book of F. S. Comstock by their bookkeeper are part of the *res gestæ* when the book could not even be evidence ; the testimony was therefore improperly admitted.

The fifth exception is at fol. 11.

F. S. Comstock was asked :

"Will you tell to the jury whether these statements were correct in point of fact?"

This was objected to, the objection overruled, and an exception taken.

These statements refer to statements made to Tappen, from which he made the entries in the blotter (fol. 10), but the blotter was not produced, and the question was therefore irrelevant and improper, and would mislead the jury, and was improperly admitted.

The sixth exception is at fol. 12.

Comstock was asked :

"Did you also state the person for whom the transaction was made?"

This was objected to. Objection overruled, and an exception taken.

This question is clearly irrelevant and is objectionable, for the reasons stated in the fifth exception, and should have been excluded.

The seventh exception is at fol. 12.

Comstock was asked :

"Now state to the jury whether the transactions which you stated to him, 'Tappen,' as having been made for the account of George M. Wheeler, were made under the authority and circumstances which you have stated?"

This was objected to. Objection overruled, and an exception taken.

This is objectionable, for the same reasons, which have been stated, to the fifth and sixth exceptions, and is an attempt to prove indirectly what has not been proved directly, viz.: the work and labor, money lent and advanced, and money laid out and expended.

The eighth exception is at fol. 18.

Noah B. Sanborn was asked:

"Did you vote on the claim as presented for assignee?"

Which was objected to, the question excluded, and an exception taken.

Sanborn testified that he attended the first meeting of creditors of F. S. Comstock & Co., and filed a proof of claim on behalf of Wheeler against Comstock & Co.; that Comstock was present at this meeting. The question should have been allowed.

The ninth exception is at fol. 24.

"After the testimony was closed, the counsel for the defendant asked the court to direct a verdict for the defendant, on the ground that the action was an assumpsit for work and labor and money advanced, and also on an account stated. There was no proof whatever of an account stated, and there is no proof of the items to maintain an action in assumpsit. This was denied, and an exception taken."

This has been considered under the first point, which see.

"In actions upon the common counts for goods sold, work and materials furnished, money lent and money had, a *request by the defendant* is material to be proved."

2 Greenl. on Ev., sec. 107.

"To sustain the count for money paid, the plaintiff must prove the *actual payment*, and the defend-

ant's prior request to do so, or his subsequent assent and approval of the act."

2 Greenl. on Ev., sec. 113.
3 Phillips' Ev., 423 (4th Am. ed.)

" In order to sustain the count for 'money paid' for the use of the defendant, it is, in the first place, necessary to *prove the payment of money*, or, at least, of what has been taken in payment of money, as negotiable securities."

3 Phillips' Ev., 423.

" An action for money paid, laid out and expended for the use of the defendant, will not lie unless the plaintiff has actually advanced money.

Cumming *v.* Hackley, 8 Johns., 202.
Douglass *v.* Moody, 9 Mass., *548.

In this case there is not a particle of testimony of any work and labor and care and diligence, of any money lent and advanced; or of any money paid, laid out and expended by F. S. Comstock & Co. for Wheeler. See first point.

There is therefore no evidence to sustain the first count of the declaration.

The second count of the declaration is upon an account stated.

This has been considered under the fifth point, which see.

The tenth exception is at folio 29.

In which the defendant excepted to the charge of the judge, that if the jury found for the plaintiff on all the questions in dispute they must assess the damages in the sum of $26,458.90 (fol. 25.) This charge was erroneous, because it took from the jury the question of the amount of damages. It was a question for the jury, and for the jury only as to the amount to be allowed for the work and

labor, as to the amount of money lent and paid out.

In the sum of $26,458.90 was included the sum of $6,125.62 (fol. 23), which arose on a transaction between the firm of F. S. Comstock & Co. and Comstock & Wheeler—that is Comstock & Wheeler were jointly interested in and liable on this account, and that amount could not be recovered in this action.

"In all actions upon contract the defendant has a right to require that his co-debtor should be joined with him."

2 Greenl. on Ev., Sec. 133.

Sixth.

The verdict should be set aside and a new trial granted.

THOMAS M. WHEELER,
Counsel for Plaintiff in Error.

U. S. Supreme Court,

OCTOBER TERM, 1876—No. 103.

JOHN SEDGWICK, as Assignee, &c.,
Defendant in Error,

vs.

GEORGE M. WHEELER,
Plaintiff in Error.

Statement and Points for Defendant in Error.

F. N. BANGS,
Of Counsel for Defendant in Error.

NEW YORK:
EVENING POST STEAM PRESSES, 208 BROADWAY, CORNER FULTON STREET.
1876.

EVENING POST STEAM PRESSES, 208 Broadway, cor. Fulton St., N. Y.

U. S. Supreme Court.

GEORGE M. WHEELER,
Plaintiff in error,

vs.

JOHN SEDGWICK, ASSIGNEE IN Bankruptcy of F. S. Comstock & Co.,
Defendant in error.

Statement of Case for Defendant in error.

The defendant in error brought an action of assumpsit in the District Court of the United States, for the Southern District of New York, against Wheeler, the plaintiff in error, for—

1. Work and labor by F. S. Comstock & Co. for Wheeler;

2. Money lent and advanced by F. S. Comstock & Co. to Wheeler;

3. Money had and received by Wheeler for F. S. Comstock & Co.

4. Money paid, laid out and expended by F. S. Comstock & Co., to and for Wheeler.

5. And also upon an account stated (32 to 36).

Wheeler pleaded *non-assumpsit* (36).

The cause was tried before a jury, who rendered a verdict against Wheeler for $26,458.90 (37).

Wheeler moved for a new trial, which was granted, unless the plaintiff would remit $3,087.33 from his damages, which the plaintiff did (39 to 42) and judgment was perfected for $24,360.51 (43).

This judgment was affirmed by the Circuit Court (51-52), and Wheeler brings error to this court.

Nine exceptions were taken by the defendant on the trial to rulings of the court on the admission of testimony (7, 8, 12, 13, 18, 21, 22).

An exception was also taken to the refusal of the court to direct a verdict for the defendant (24), and the record states (29) that the defendant excepted "to the ruling that the plaintiff was entitled to recover $26,458.90."

Points for Defendant in Error.

I.—*First Exception:* Frederick S. Comstock, one of the bankrupts, had testified as a witness for the plaintiff (6, 7) that F. S. Comstock & Co. had been stock brokers, and had bought and sold stock for Wheeler, which necessarily implied that the firm had advanced money to and for him, and had received money on his account. The witness had also testified (7) to a conversation between himself and Wheeler, as to how much Wheeler owed the firm.

The witness was then asked (7) "what did George M. Wheeler say in regard to paying the balance of the account at that time?"

This was objected to and admitted, and the exception is to the admission of the question.

We submit that the subject of the question was material, and that the testimony asked for was competent.

The subject of the question was, Wheeler's own declarations about paying the balance of his account with F. S. Comstock & Co. This was material to the inquiry whether or not an account had been stated, and the witness was competent to prove Wheeler's declarations.

II.—*Second Exception:* This exception is to the ruling of the court in admitting a particular answer to a question which had not been objected to (7).

The question to which the answer was given was put by the court in reference to what the balance was stated to be at the time when Wheeler promised to pay it.

The answer consists of four sentences, but appears to have been objected to as a whole, without any specific ground of objection being stated. The substance of the answer is that Mr. S. G. Wheeler brought the figures, showing a balance of between $8,000 and $10,000, and asked the witness if that was correct, and Mr. G. M. Wheeler, the defendant, said the account stands "so and so."

This answer was certainly responsive to the question of the court, and contained nothing which exposed it to a general objection.

III.—*Third Exception:* The witness stated (8) that the purchases and sales for the defendant were correctly entered in the books of F. S. Comstock & Co.; and he was then asked, "Did the defendant have access to the account in your books?"

The exception is to the ruling of the court in admitting that question.

It was certainly material to know—in connection with the question of an account stated, and also in connection with the testimony already given, that accounts (which must have been taken from the books) had been rendered to the defendant,—whether or not the defendant did, in fact, have access to the books. That would develop the fact whether he did or not have the means of verifying the accounts; and the question was also material upon the subject of a ratification by him of the transactions in question.

IV.—*Fourth Exception:* A witness for the plaintiff, who had been the book-keeper of F. S. Comstock & Co., had testified that he made blotter and ledger entries from information furnished to him by Mr. Comstock, and made them in accordance with such information (10), and that he had rendered to Wheeler monthly accounts transcribed from the ledger.

Mr. Comstock was then asked in substance (11, 12), whether the information he gave his bookkeeper was correct as to the number of shares, the prices, and the fact of a sale, without reference to whom it was for, and also a description of the stock.

The exception is to the ruling of the court in admitting that question.

We contend that the question was admissible.

It must be borne in mind that the plaintiff was seeking to prove actual advances of money, and also the stating of an account relating to such advances.

The transactions in question took place prior to October, 1867.

The trial occurred November 18, 1872 (6).

The witness could not be expected to testify from memory to the transactions themselves, but it was competent for the plaintiff to make the effort, by laying the proper foundation, to get the books in evidence. To that end, and as a link in the chain of evidence, it was proper for him to show, as he did, that transactions were had (7); that the party who did the business gave the particulars to a third person, and that that third person made correct entries of them, and gave copies of such entries (10, 11) to the defendant. This was proper preliminary evidence, addressed to the court, upon the question which the plaintiff had a right to raise, whether or not he should be permitted to offer the books for the purpose of proving the contents of the accounts rendered, and for the purpose of proving a ratification.

But as the books were not allowed in evidence (29), the court must have held against the sufficiency of the preliminary proof (even if the books were offered), and its admission did no harm. Neither witness gave any evidence as to what the statements were.

5 *Peters*, 132, *Greenleaf's Lessee* vs. *Birth*.

V.—*Fifth Exception:* The same witness was asked (12), "Did you also state the person for whom the transaction was made?" The exception was to the admission of this question.

The question was a part of the same chain of preliminary proof.

Its admission did no harm; and as the witness did not indicate the person whose name he gave his bookkeeper, the answer was harmless also.

VI.—*Sixth Exception:* Pursuing the same course of preliminary proof, this same witness was asked (13), "Now state to the jury whether the transactions which you stated to him as having been made for the account of George M. Wheeler were made under the authority and circumstances which you have before stated?"

This was objected to, without the ground of objection being stated, and the exception is, that the objection was overruled.

The answer to the objection is, that it was proper to show that whatever statements the witness had made about George M. Wheeler were true, as preliminary to a showing, or as following upon a showing already in (11), that the statements were reduced to writing and communicated to Wheeler, and received by him without objection. This bore not merely upon the question of the stating of an account, but upon the actuality and reality of the transactions embraced in the account.

The answer to the question consisted only of proper preliminary matter. There was nothing of hearsay in it. It did not appear what the witness had stated about Wheeler.

VII.—*Seventh Exception:* The defendant proved that at a meeting of creditors of F. S. Comstock & Co.,

called for the purpose of electing an assignee in bankruptcy, a proof of debt was filed by Wheeler; and that Comstock was present, and made no objection to the proof being voted on. The witness was then asked, "Did you vote on the claim as presented, for the assignee" (18)?

The exception is, to the exclusion of that question.

We contend that the question was immaterial.

It could have no effect on the rights of the parties to this suit, whether the witness voted or abstained from voting.

His being permitted to vote was not an admission by the assignee, for the assignee was not yet appointed. If it was an admission by Comstock, Comstock's admission, made after he had been adjudged bankrupt, was not competent evidence against his assignee. The fact of voting would not even go to the question of the credibility of Comstock's evidence in this case, for it does not appear that he knew of the filing of the claim, or of the offer to vote.

If, on the other hand, the witness did not vote for the assignee, his omission to vote proved nothing against the plaintiff.

VIII.—*Eighth Exception:* This exception was to the ruling of the court (21) in permitting a question to be put to a witness for the plaintiff; but the witness did not answer the question.

IX.—*Ninth Exception:* This exception was to the ruling of the court (22), in permitting two questions

The question was a part of the same chain of preliminary proof.

Its admission did no harm; and as the witness did not indicate the person whose name he gave his bookkeeper, the answer was harmless also.

VI.—*Sixth Exception:* Pursuing the same course of preliminary proof, this same witness was asked (13), "Now state to the jury whether the transactions which you stated to him as having been made for the account of George M. Wheeler were made under the authority and circumstances which you have before stated?"

This was objected to, without the ground of objection being stated, and the exception is, that the objection was overruled.

The answer to the objection is, that it was proper to show that whatever statements the witness had made about George M. Wheeler were true, as preliminary to a showing, or as following upon a showing already in (11), that the statements were reduced to writing and communicated to Wheeler, and received by him without objection. This bore not merely upon the question of the stating of an account, but upon the actuality and reality of the transactions embraced in the account.

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It could have no effect on the rights of the parties to this suit, whether the witness voted or abstained from voting.

His being permitted to vote was not an admission by the assignee, for the assignee was not yet appointed. If it was an admission by Comstock, Comstock's admission, made after he had been adjudged bankrupt, was not competent evidence against his assignee. The fact of voting would not even go to the question of the credibility of Comstock's evidence in this case, for it does not appear that he knew of the filing of the claim, or of the offer to vote.

If, on the other hand, the witness did not vote for the assignee, his omission to vote proved nothing against the plaintiff.

VIII.—*Eighth Exception:* This exception was to the ruling of the court (21) in permitting a question to be put to a witness for the plaintiff; but the witness did not answer the question.

IX.—*Ninth Exception:* This exception was to the ruling of the court (22), in permitting two questions

to be put to a witness for the plaintiff, but it does not appear that the witness answered either question.

X.—*Tenth Exception:* At the close of all the testimony, the defendant asked the court (24, *p.* 9) to direct a verdict for him, "on the ground that the "action was on assumpsit for work and labor and "money advanced, and also on an account stated. "There was no proof whatever of an account "stated, and there was no proof of the items to "maintain an action of assumpsit."

The court denied this motion, and the exception is to that denial.

1. There was proof of an account stated.

Comstock testified (9) that after the last transaction stated in the account, and a few days before the failure of the firm, which was in October, 1868, Wheeler said he would pay it as soon as he could get a mortgage on his country property; that the accounts rendered Wheeler were correct copies of the ledger; and that the last account rendered was September 30, 1868.

Tappen, the book-keeper of F. S. Comstock & Co., testified (11) that accounts were monthly made from the ledger and submitted to the defendant, all during the fall and winter of 1867 and 1868, and that he never heard the defendant express any dissent.

The defendant himself produced (*Exhibits* 1 *and* 2, *pp.* 5, 6) accounts rendered to him, covering the transactions of September and October, 1867.

Tappen and Comstock testified (19, 21, 22) that

there were special transactions in the Northwest stock, ending January 31, 1868, resulting in a loss of about $12,251.23, and Tappen said that the defendants' share of that loss, being one-half, was included in accounts subsequently rendered, down to September 30, 1868.

Comstock testified (9) that the first time defendant ever objected to the accounts was two or three days after the failure of the firm, which must, therefore, have been several days after the defendant had promised to pay the balance shown by the accounts, and about a year after the account for October, 1867, had been rendered.

This was evidence of an account stated in October, 1867, in relation to the transactions prior to that time, and in January 1868, in relation to the special transaction.

11 *N. Y.*, 175, *Lockwood* vs. *Horne.*
18 *Id.*, 290, *S. C.*
54 *Id.*, 485, *Stenton* vs. *Jerome.*
12 *Peters*, 300, *Toland* vs. *Sprague.*

2. There was evidence of money having been paid, laid out, expended and advanced by F. S. Comstock & Co., to and for Wheeler, at his request.

Comstock testified that his firm bought and sold stock for the defendant by his authority (7). This necessarily implied that the firm paid out money for him.

Then the evidence showed that the transactions were correctly entered in the ledger, and transcribed from the ledger into accounts rendered, in which Wheeler was charged with money paid, and credited with money received, and that he received and retained the accounts without objection. There was therefore evidence, direct and by Wheeler's admission, of money advanced in the purchase of stocks.

XI.—*Eleventh Exception:* The record states (29), that the defendant's counsel "excepted to the ruling that the plaintiff is entitled to recover $26,458.90."

But there is no such ruling in the charge. The instruction was (25), "If you find for the plaintiff on *all* the questions in dispute, then you must assess the damages at $26,458.90, and bring in your verdict in his favor for that amount."

If this instruction is to be considered as having been excepted to, then we maintain its correctness.

The court left it to the jury (25) to say whether the bankrupts had original authority to make the sales and purchases in question; or, if not, whether Wheeler had ratified those transactions. And the court put the burden of proof as to the sales, on the plaintiff (29).

The jury found that Wheeler either originally authorized, or subsequently ratified the transactions.

Then the only question was as to the amount of money which the bankrupts had advanced in excess of what they had received.

On that point the evidence was clear.

The account rendered October 31, 1867 (*Exhibit* 2, *p.* 6), showed an expenditure by the bankrupts, of $53,049.34, in excess of their receipts. This expenditure Wheeler authorised or ratified. Then the special account, rendered January 1868, showed (19) an expenditure, which he either authorized or ratified, of $6,125.62. Then the bankrupts made sales for him between December 1867, and February 1868, amounting to $51,080.52. These sales the defendant either authorized or ratified. Collating all these items, and the interest on them, a witness testified (23) that the excess of receipts over expenditures was $26,458.90, so that the charge of the judge was in strict accord with uncontradicted evidence.

XII.—The judgment of the Circuit Court should be affirmed.

F. N. BANGS,
Of Counsel for Deft. in Error.